STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL P. PEAKE,

Plaintiff/Counterdefendant/
Appellant,

v

CAROL D. PEAKE,

Defendant/Counterplaintiff/
Appellee.

UNPUBLISHED
March 13, 2003

No. 234152
Oakland Circuit Court
LC No. 00-639724-DO

Before: White, P.J., and Kelly and R.S. Gribbs,[*] JJ.

PER CURIAM.

Plaintiff appeals as of right the default judgment of divorce. We affirm.

Plaintiff first argues that the trial court improperly considered him in default when he did not appear for trial on February 20, 2001, after plaintiff also failed to appear in court on January 22, 2001, the original date for the first day of trial. Plaintiff argues that the trial court erred in concluding that he was in default since he appeared by virtue of his attorney's presence, or alternatively, his presence was not required. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to enter a default judgment of divorce for failure to appear for a scheduled trial. MCR 2.603(B)(1)(d); MCR 2.603(B)(3); see *Muscio v Muscio*, 62 Mich App 167, 169; 233 NW2d 224 (1975). Similarly, this Court reviews a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

Plaintiff correctly asserts that his presence was not required at the February 20, 2001, hearing. *Bye v Ferguson*, 138 Mich App 196, 206-208; 360 NW2d 175 (1984). However, plaintiff's argument ignores the consequences for his failure to appear. When a party chooses not to appear, he risks a judgment. *Bye, supra*, 138 Mich App 206-207. Here, plaintiff failed to attend two scheduled trial dates, and accordingly, risked that a default judgment would be entered against him. *Id*.

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

We similarly reject plaintiff's argument that the default judgment did not comply with court rules. MCR 2.603 (A)(1) provides, in pertinent part:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

Additionally, MCR 2.603(B)(1)(d) provides:

> If the default is entered for failure to appear for a scheduled trial, notice under this subrule is not required.

Here, the trial court entered the default judgment on the grounds that plaintiff failed to appear for trial. Although plaintiff argues that the default judgment did not comport with the court rules, the trial court entered the default judgment on the basis that plaintiff failed to appear, and thus, plaintiff was not required to receive notice. MCR 2.603(B)(1)(d).

The record does not support plaintiff's argument that he was not told that he had to be in court on January 22, 2001, or his claim that he was unaware of the February 20, 2001, proceeding. Plaintiff relies on a notice from the court indicating that January 20, 2001, was scheduled for pretrial by the assignment clerk. However, a review of the record indicates that plaintiff's last appearance in court, before the default judgment, occurred on December 19, 2000. On the same day, because plaintiff refused to comply with the proposed consent agreement, the trial court informed plaintiff that the case would be scheduled for trial and a scheduling order was entered. Further, on January 22, 2001, plaintiff's original attorney, Robert Wick, informed the court that plaintiff knew about the trial date and that plaintiff had telephoned Wick and left a message "without explanation" that he would not be in court. The record reflects that plaintiff had sufficient knowledge of the first trial date, and thus, the trial court had the authority, as early as January 22, 2001, to enter a default judgment against him. MCR 2.603(B)(1)(d).

Plaintiff's argument emphasizes that he was "misinformed" of the February 20, 2001, trial date because he only received notice of the February 28, 2001, hearing on counsel's motion to withdraw and not the notice of the February 20, 2001, trial date. Plaintiff argues that the trial court improperly allowed defendant to file a counterclaim because he was not in default. However, both counsel stated on the record that plaintiff had been notified of the February 20, 2001, trial date. The record also shows that Wick mailed a copy of defendant's counterclaim to plaintiff on January 30, 2001. Defendant's counsel verified that the address on file was the same address that plaintiff used as his return address on recent correspondence to defendant. Wick further indicated that the counterclaim was not sent back to him. However, plaintiff had not been in touch with Wick and had not instructed him as to how to proceed. This Court has stated that service of process may be given to an attorney at his last known address. MCR 2.107(C). Mailing creates a presumption that the documents were received. See *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). While this presumption may be rebutted, the question of whether it was rebutted is for the trier of fact. *Stacey v Sankovich*, 19 Mich App 688, 694; 173 NW2d 225 (1969). While plaintiff insists that he did not receive proper notice, plaintiff's argument directly conflicts with the representation made by Wick, and as such, became an issue of credibility. In a divorce action, this Court gives special deference to a trial

court's findings when based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

Moreover, in light of plaintiff's claim that he lacked notice, the trial court scheduled an evidentiary hearing to resolve the matter. Plaintiff had the opportunity to establish that Wick had not provided him notice. Instead, plaintiff waived his right to testify, failed to present any evidence, and argued that the notice of a February 28, 2001, hearing on counsel's motion to withdraw was proof that he was "misinformed" about the February 20, 2001, trial date. We note that plaintiff, even without calling Wick as a witness,[1] could have submitted evidence that he had not received the notice of the February 20, 2001, trial date and instead had "relied" on the notice regarding the February 28, 2001, hearing date. Despite plaintiff's record of failing to follow the trial court's orders, or to be honest with the court,[2] the trial court gave plaintiff every opportunity to show that he had not received notice. The trial court did not err in resolving the credibility issue against plaintiff. *Draggoo*, *supra*, 223 Mich App 429.

Plaintiff also argues that the trial court improperly proceeded on defendant's counterclaim because defendant failed to make a motion to file a counterclaim, and defendant fraudulently inserted language allowing defendant to file a counterclaim into a previously prepared handwritten order. We disagree.

"A counterclaim . . . must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118." MCR 2.203(E). To comply with MCR 2.118, " . . . a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). Here, defendant received consent of the adverse party as reflected by Wick's signature on the December 19, 2000 order, which specifically granted defendant leave to file the counterclaim in its written order.

Plaintiff argues that a separate motion should have been made on the record, or that defendant should have filed a written motion. Again, we disagree. Motions may be oral or written. MCR 2.119(A)(1); See *Jager v Nationwide Truckers Brokers, Inc*, 252 Mich App 464, 470; 652 NW2d 503 (2002). Alternatively, parties may stipulate or agree to forgo a traditional court rule requirement. Although plaintiff takes great offense at the practice of handwritten orders and objects to defense counsel's practice of preparing orders in advance for the trial court's signature, we note that it is common practice for attorneys to have prepared orders ready for the trial court. Indeed, such a practice ensures the prompt entry of orders. Moreover, MCR 2.602 provides:

> (1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court and dated with the date they are signed.

---

[1] Plaintiff objected to the trial court's order requiring Wick to testify at the evidentiary hearing on the basis that it violated attorney-client privilege.

[2] Plaintiff acted in contravention of a direct order of the trial court to not remove property from the marital home before defendant took possession. Plaintiff defied the order and removed all the furniture and appliances. Plaintiff also damaged walls and the floors.

Plaintiff has presented no authority to establish any restriction on a trial court's ability to sign a prepared handwritten order. MCR 2.602(1).

Plaintiff also argues that the trial court improperly allowed his counsel to withdraw. This issue was not raised in plaintiff's statement of questions presented. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions presented. *Ewing v Detroit*, 252 Mich App 149, 169; 651 NW2d 780 (2002). Accordingly, this issue is not properly presented to this Court and not subject to appellate review. In any event, we may address an issue raised in a nonconforming brief if it is one of law for which the record is factually sufficient. *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 641; 506 NW2d 920 (1993).

An attorney who has entered an appearance for a party may withdraw only with the party's consent or by leave of the court. MCR 2.117(C)(2); *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). Under the Michigan Rules of Professional Conduct, withdrawal is permitted if it can be "can be accomplished without material adverse effect on the interests of the client." MRPC 1.16; see *Bye, supra***,** 138 Mich App 207-208.

Wick moved to withdraw at the January 22, 2001, hearing. The trial court ordered Wick to notify plaintiff that Wick's "withdrawal has been allowed and that a trial date 28 days from today has been established and that his failure to appear will result in entry of a judgment of divorce." The trial date was set for February 20, 2001, and an order was issued. As noted previously, Wick informed the court on February 20, 2001, that plaintiff had been served. Wick continued to represent plaintiff until after the February 20, 2001, default judgment had been entered. The trial court allowed Wick to withdraw on the condition that he first notify plaintiff notice that a default judgment had been entered when plaintiff failed to appear for trial. Further, in the order allowing Wick to withdraw, the trial court provided plaintiff twenty-one days to appear in court or file a motion for relief. After plaintiff retained new counsel, plaintiff filed a motion to set aside the default judgment on March 12, 2001, which provided him the opportunity for relief from the default judgment. The fact that plaintiff did not succeed on his motion to set aside the default judgment is insufficient to establish that plaintiff was materially adversely effected. The trial court continued to protect plaintiff's interests and provided Wick with the opportunity to cross-examine or present evidence regarding the proposed settlement in plaintiff's absence. Wick's continued representation of plaintiff on February 20, 2001, prevented any prejudice or material adverse effect to plaintiff. Accordingly, the trial court did not abuse its discretion in allowing Wick to withdraw. *In re Withdrawal of Attorney, supra*, 234 Mich App 431.

Plaintiff next argues that the trial court erred by not reporting criminal conduct on the part of defendant or defense counsel to law enforcement authorities. We disagree. Plaintiff argues that defendant committed a criminal act of forgery by not returning the quitclaim deed and recording the deed with a modification without his consent. The record reflects that plaintiff gave the deed to defendant in anticipation that a consent judgment of divorce would be entered on January 22, 2001. We note that although a consent judgment was not entered, plaintiff's counsel informed the court that defendant's receipt of the deed was a *fait accompli*. Plaintiff was present in court and did not object or make a request for the return of the deed on the record, and thus, plaintiff's argument that defendant was obligated to return the quitclaim deed is disingenuous.

Nonetheless, plaintiff also argues that the deed was inoperative because the condition precedent, that a judgment of divorce be entered on December 19, 2000, did not occur. Plaintiff's argument fails because his conduct constituted an anticipatory breach, when he prevented the condition precedent from occurring by failing to pay defendant $5,000 in a lump-sum payment, as the parties had previously agreed. An anticipatory breach occurs when a contracting party declares, at a time prior to performance through its words or actions, that it will not perform. *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992). This Court has held that that where a party to a contract hinders another party's ability to comply with a condition precedent, thereby making it difficult, if not impossible, for that party to satisfy its obligations under the contract, the obstructing party may not rely on the condition precedent to defeat its liability. See *Stanton v Dachille*, 186 Mich App 247, 257-258; 463 NW2d 479 (1990). Accordingly, the condition precedent is invalid and defendant was entitled to correct the deed to reflect the parties' status at the time of the recording. Moreover, plaintiff has not established the requisite intent to defraud to sustain an act of forgery. Intent to defraud is the gist of the offense of forgery. MCL 750.248; *People v Gil*, 8 Mich App 89, 92-93; 153 NW2d 678 (1967).

Plaintiff also argues that the distribution of marital property was inequitable. Again, we disagree. On appeal, this Court must first review the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). Findings of fact, such as a trial court's valuations of particular marital assets, will not be reversed unless clearly erroneous. *Id.* If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id*., 151-152. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Id.*

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departures from an equal distribution should be supported by a clear exposition of the trial court's rationale. *Id*., 114-115. Here, defendant provided testimony regarding the proposed settlement and submitted the valuation report as evidence. Defendant testified that the business was worth approximately $79,000 and plaintiff had taken approximately $39,000 in cash and cash equivalents. Defendant also indicated that the marital home had an established equity of $50,000. Defendant had a 401K plan valued at $4,000 and defendant stated that the marital estate had an approximate value of $133,000. Defendant further testified that a fifty percent split would entitle plaintiff and defendant with approximately $66,500. However, defendant received a judgment of $30,000 because plaintiff stripped the marital home of the furniture and appliances, and defendant did not ask for spousal support. Wick was provided with an opportunity to rebut the value of plaintiff's business. After Wick questioned the methods and accuracy of the business valuation, he conceded that plaintiff had provided him with no evidence to rebut the valuation report. Accordingly, the trial court's findings were not clearly erroneous, and we are not left with the conviction that the division was inequitable. *Sparks, supra*, 440 Mich 151-152.

Plaintiff also argues that the distribution of the marital estate was inequitable because he was not allowed to fully participate in the negotiations regarding the proposed sale of the marital home and he should have been entitled to a portion of the sale proceeds. Again, we disagree.

This Court has stated that a property division is not rendered inequitable simply because the adverse party was not allowed to participate in its adjudication. *Draggoo, supra,* 223 Mich App 425-429.

Plaintiff further argues that the trial court erred in approving the sale of the marital home because he was entitled to participate in the sale negotiations, and canceling the lis pendens. We note that the final order in this case was entered on February 20, 2001, and that plaintiff filed an appeal as of right on May 4, 2001. However, plaintiff, in these issues, challenges post-judgment orders that were entered on May 21, 2001, and May 23, 2001. The requirements for filing an appeal of right are reflected in MCR 7.203, which provides, in pertinent part:

> (A) Appeal of Right. The [C]ourt has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> (1) A final judgment or final order of the circuit court, court of claims, and recorders court, as defined in MCR 7.202(7), except a judgment or order of the circuit court or recorder court's court.
>
> (2) A judgment or order of a court or tribunal from which appeal of or right to the Court of appeals has been established by law or court rule;
>
> (3) In a domestic relations action, a postjudgment order affecting the custody of a minor.
>
> (4) An order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule.

Plaintiff, in these issues, does not challenge an order affecting child custody or the award of costs. Plaintiff could have filed an application for leave to appeal both the May 21, 2001, order approving the sale of the home, and the May 23, 2001 order, canceling the lis pendens pursuant to MCR 7.205, but did not do so. Consequently, we do not have jurisdiction to review these issues. MCR 7.203.

Plaintiff also argues that the trial court erred when it concluded that his motion to set aside the default judgment was not well grounded in fact. We disagree. As a preliminary matter, although this issue involves a post-judgment order that was entered on May 3, 2001, this Court may review the issue because it involves the award of attorney fees. MCR 7.203(4).

This Court will not disturb a trial court's finding that a pleading was frivolous unless the finding was clearly erroneous. See *Powell Production, Inc v Jackhill Oil Co,* 250 Mich App 89, 94; 645 NW2d 697 (2002). To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made. *Powell Production, Inc, supra,* 250 Mich App 94. A party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2), which in turn provides that costs are to be awarded pursuant to MCL 600.2591. *Id.*, 95.

Every document of a party represented by an attorney must be signed by at least one attorney of record. MCR 2.114(C). The signature constitutes a certification that: (1) the signor

has read the pleading,[3] (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) the pleading is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation. MCR 2.114(D); See *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720; 591 NW2d 676 (1998).

Here, the trial court concluded that plaintiff's motion was not grounded in fact because plaintiff failed to support his claim with any evidence at the evidentiary hearing. Further, plaintiff's motion to set aside the default judgment provided no explanation or mention of his failure to attend the first day of trial scheduled for January 22, 2001. Instead, plaintiff emphasized that his absence on February 20, 2001 was because of the notice of hearing for February 28, 2001. However, as discussed previously, plaintiff's motion to set aside the default judgment does not provide any facts to establish that he relied on the notice of hearing. Further, prior to the evidentiary hearing, the trial court informed plaintiff's counsel that Wick's statements were in direct conflict with plaintiff's allegations. However, plaintiff refused to call any witnesses or provide any testimony in support of his motion, or alternatively, to rebut Wick's statements. Additionally, in light of Wick's statements to the trial court that defendant already received the quitclaim deed as agreed, plaintiff's argument that defendant improperly received the marital home was disingenuous. Accordingly, we are satisfied with the trial court's conclusion that plaintiff's motion to set aside the default judgment was not well grounded in fact. MCL 600.2591; *Powell Production, Inc, supra,* 250 Mich App 94. Therefore, the trial court did not clearly err in its findings and in awarding fees.

Plaintiff also argues that the trial court failed to recuse itself after plaintiff filed a complaint with the judicial tenure commission, or act impartially. We disagree. When this Court reviews a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion; however, the applicability of the facts to relevant law is reviewed de novo. *Armstrong v Twp of Ypsilanti*, 248 Mich App 573, 596; 640 NW2d 321 (2001). We note that plaintiff provides no authority for the proposition that a trial judge must recuse himself if a complaint is filed with the judicial tenure commission. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions presented. *Ewing, supra,* 252 Mich App 169. In any event, the Code of Judicial Conduct, Canon 3, provides:

> C. Disqualification. A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).

The grounds for disqualification are outlined in MCR 2.003(B), which provides:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

[3] MCR 2.114 applies not only to pleadings as defined in MCR 2.110(A), but also to other papers provided by the court rules. MCR 2.113(A); *Bechtold v Morris*, 443 Mich 105, 108-109; 503 NW2d 654 (1993).

(1) The judge is personally biased or prejudiced for or against a party or attorney.

(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The judge has been consulted or employed as an attorney in the matter in controversy.

(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(a) is a party to the proceeding, or an officer, director or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have more than de minimis interest that could be substantially affected by the proceeding.

In our review of the plain language of the court rule, we conclude that MCR 2.003 does not mandate that a trial judge is automatically disqualified on the grounds that a complaint has been filed with the judicial tenure commission, unless the trial judge believes that he cannot continue to impartially hear the case. Absent a showing of actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id*.

Here, on the basis of our review of the record, plaintiff has not established prejudice or bias. The trial court could have entered a default judgment after plaintiff failed to appear on the first scheduled day of trial, and instead, entered a default judgment only after plaintiff missed a second day in court on February 20, 2001. Further, the trial court continued to protect plaintiff's interests by requiring Wick to provide plaintiff with notice of his withdrawal and the counterclaim. Plaintiff's interests were also protected when the trial court required Wick's continued representation of plaintiff throughout the February 20, 2001, hearing. Further, the trial court scheduled an evidentiary hearing to provide plaintiff with an opportunity to submit evidence that he had not received notice of the two previous trial dates and, more importantly, the trial court declined to conduct the evidentiary hearing in plaintiff's absence. In addition, defendant's initial motion to cancel the lis pendens was denied, which was a ruling in plaintiff's favor. *Armstrong*, *supra*, 248 Mich App 597. The fact that the trial court ultimately ruled

against plaintiff is insufficient to establish bias or prejudice. *Id.* In light of the trial court's continued efforts to protect plaintiff's interest in his absence, and plaintiff's failure to cite any authority for the proposition that the filing of complaint with the judicial tenure commission requires automatic recusal, plaintiff is not entitled to appellate relief on this issue.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs